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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

BETH ANN BARTON,

Plaintiff and Appellant,

v.

ELIAS, ELLIOT, LAMPASI, FEHN,  
HARRIS & NGUYEN et al.,

Defendants and Respondents;

BRIAN C. PEARCY,

Objector and Appellant.

E068331

(Super.Ct.No. CIVDS1412670)

OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J.  
Schneider, Jr., Judge. Affirmed.

Holstein, Taylor and Unitt and Brian C. Unitt for Plaintiff and Appellant Beth Ann  
Barton and for Objector and Appellant Brian C. Percy.

Ford, Walker, Haggerty & Behar, William C. Haggerty, Melissa M. Leos and  
Neil S. Tardiff for Defendants and Respondents.

In this tort action, Beth Ann Barton alleged that she suffered an allergic reaction to her dental crowns. Barton's dentist, Mueid Dee Salim Elias, D.D.S., placed the crowns in April 2010. After suffering symptoms for two years, Barton had another dentist remove the crowns. Nearly two years after that, she learned that she was allergic to palladium, a component of the crowns. In August 2014, Barton sued Dr. Elias and related corporate entities (collectively the dental defendants) for fraud, negligent misrepresentation, and professional negligence.<sup>1</sup> She alleged additional products liability causes of action against the dental defendants, the maker of the crowns, and the supplier of the metal alloys used in the crowns.<sup>2</sup>

On appeal, Barton challenges the court's order granting the dental defendants' motion for summary adjudication, its order granting their motion to strike the first amended complaint (FAC), and its order imposing sanctions against her. Because the court imposed sanctions against both Barton and her counsel, her counsel also appeals from the sanctions order. We reject each of these challenges and therefore affirm the judgment and the sanctions order.

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<sup>1</sup> The related corporate entities are Elias, Elliott, Lampasi, Fehn, Harris & Nguyen, A Dental Corporation, doing business as Riverside Dental Group; and M. Dee Elias, D.D.S., Inc.

<sup>2</sup> The maker of the crowns and the supplier are not parties to this appeal but are respondents in related appeals. (See *Barton v. Argen Corporation* (E068583, app. pending); *Barton v. Nationwide Dental Laboratory, Inc., et al.* (E069947, app. pending).)

## BACKGROUND

### *I. Background Facts*

In July 2009, Dr. Elias recommended that Barton get crowns on two of her teeth. He prepared her teeth for crowns and placed temporary ones in March 2010. According to Barton, Dr. Elias recommended high noble gold crowns. She asked him to use the manufacturer of her old crowns, a lab owned by Bob Alexander, and she said that she wanted “the best material.” Dr. Elias confirmed that he would use the Alexander lab and would use “only the best materials.”

For his part, Dr. Elias did not recall Barton asking him to use the Alexander lab. He ordered gold crowns from Nationwide Dental Laboratory, Inc. (Nationwide). He expected that when he ordered gold crowns, the lab would give him high noble crowns. He understood high noble crowns to contain around 60 percent gold.

Dr. Elias placed the permanent crowns on April 5, 2010. An IdentAlloy certificate from The Argen Corporation (Argen) was attached to Barton’s dental chart. The certificate bore the notations “HN,” “High Noble,” and “Alloy Argenco 5” (block capitals omitted) and stated: “The manufacturer certifies that the dental casting alloy provided to the laboratory with this certificate is a High Noble Alloy. The laboratory certifies that High Noble alloy was used to fabricate this prosthesis.” The certificate showed that the crown contained 88.9 percent gold and 1.9 percent palladium, among other elements.

Argen shipped IdentAlloy certificates with its alloys whenever dental labs requested the certificates. The certificates stated the name and composition of the alloys.

According to an Argen executive, the IdentAlloy certificate attached to Barton's chart was unlike any certificate Argen had ever made or shipped with its products.

Barton saw Dr. Elias on April 15 and 27, 2010, and complained on both dates that her cheek felt swollen, her "bite felt off," and she was experiencing general discomfort in the area of her crowns. He adjusted her crowns on both dates.

On May 11, 2010, Barton saw Dr. Elias and again complained about various symptoms; she had jaw pain and a "funny feeling" in her mouth and cheek, and her cheek felt swollen. On May 18, she saw the doctor yet again because she was still experiencing pain and discomfort in the area of the crowns. She also complained about a nodule growing on the left side of her tongue next to the crowns. She expressed concern that she was having some sort of allergic reaction, and she asked Dr. Elias to remove the crowns. He said that she was not having an allergic reaction and nothing was wrong with the crowns. The doctor gave Barton the contact information for Nationwide and a copy of the lab slip showing that Nationwide made the crowns with the Argenco 5 alloy.

On September 27, 2010, Barton had another appointment with Dr. Elias and continued to report jaw pain, an uncomfortable bite, and swelling in the area of the crowns. Dr. Elias recommended that she see a temporomandibular joint specialist.

On October 18, 2010, Barton consulted an oral surgeon because she was dissatisfied with Dr. Elias's explanations for her symptoms. The oral surgeon removed the growth on her tongue that was next to the crowns.

On February 3, 2012, an allergist determined that Barton was allergic to nickel, and the two of them discussed the possibility that her crowns contained nickel. The

allergist's notes stated that Barton had experienced "problems with mouth irritation since her crowns were cemented almost 2 years ago." Barton contacted Argen in March to ask whether the crowns could be tested for nickel without removing them. Argen told her that such testing was not possible.

In May 2012, another dentist removed Barton's crowns. According to that dentist's records, Barton was concerned that she was having an allergic reaction to her crowns. Barton had a lab analyze one of the crowns in June 2013. The crown did not contain nickel but contained 3.01 percent palladium, and its overall composition was consistent with a noble crown, not a high noble crown. The crown contained only 49.8 percent gold.

On November 21, 2013, Barton contacted a dermatologist to perform patch testing for allergies. The patch testing occurred in February 2014 and revealed that Barton was allergic to palladium.

## *II. Barton's Complaint*

Barton filed this action on August 26, 2014. The cause of action for fraud alleged that the dental defendants failed to provide "appropriate information" about the materials available for the crowns; misrepresented the composition of Barton's crowns and failed to give her high noble crowns as promised; and misrepresented their commitment to patient safety by failing to use a local lab certified by the United States Food and Drug Administration, failing to fully inform her of the potential side effects of crowns containing toxic components, failing to conduct any allergy tests, failing to present other viable options for her treatment, and failing to obtain her fully informed consent to the

crowns. The negligent misrepresentation cause of action incorporated most of the fraud allegations and asserted that the dental defendants made the misrepresentations with no reasonable ground for believing them to be true.

The cause of action for professional negligence also incorporated most of the fraud allegations and alleged that the dental defendants negligently failed to exercise the proper degree of knowledge and skill in designing, inspecting, and distributing dental crowns, in disclosing material risks to Barton, in treating her, and in diagnosing her allergic reaction.

Barton designated three more causes of action “[p]roducts [l]iability” claims, all of which also incorporated most of the fraud allegations. (Boldface omitted.) The cause of action for strict liability alleged that the dental defendants designed, specified, ordered, inspected, sold, and installed crowns; the crowns they used on Barton were defective and unsafe because they lacked adequate warnings as to possible side effects; and the dental defendants breached their duty to warn her of the side effects. The cause of action for “[p]roducts [l]iability–[n]egligence” was nearly identical to the strict liability cause of action, but it expressly asserted that the dental defendants negligently designed, specified, inspected, prescribed, and sold crowns. (Boldface omitted.) The cause of action for “[p]roducts [l]iability–[b]reach of [w]arranty” alleged that the dental defendants breached warranties that Barton’s crowns were free from defects, safe, and merchantable. (Boldface omitted.)

### III. *The Dental Defendants’ Summary Judgment Motion*

The dental defendants moved for summary judgment or, in the alternative, summary adjudication. They argued that the professional negligence cause of action was

barred by the one-year statute of limitations. (Code Civ. Proc., § 340.5 [statute of limitations for professional negligence against a health care provider].)<sup>3</sup> They further argued that the fraud and negligent misrepresentation causes of action failed because there was no evidence that they intended to induce reliance on any alleged misrepresentations. As to the three products liability causes of action, they argued that they were providers of medical services, not suppliers of the product at issue, and they could not therefore be liable for alleged defects in the crowns.<sup>4</sup>

Barton opposed the summary judgment motion but encountered some difficulties with the filing. She was required to serve and file her opposition 14 days before the hearing, which was set for January 10, 2017. (§ 437c, subd. (b)(2).) According to the declaration of her counsel's legal assistant, Barton tried to file her opposition papers by fax on December 27, 2016. After faxing the documents, her counsel's fax machine printed a "transmission verification report" showing that the fax had gone through. (Capitalization omitted.) Counsel checked the court's website on January 4, 2017, and discovered that the opposition papers did not appear on the docket. His office contacted the court and was told that the court had no record of receiving the opposition papers. Barton refaxed her opposition papers, and the court filed them on January 5, 2017.

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<sup>3</sup> Further undesignated statutory references are to the Code of Civil Procedure unless otherwise indicated.

<sup>4</sup> Barton also named Nationwide, Argen, and an entity allegedly owned and operated by Nationwide (Nationwide Dental (Xiamen) Co., Ltd.) in the products liability causes of action. Each of these three defendants moved separately for summary judgment.

The dental defendants filed their reply brief on this same date. Barton had timely served them with the opposition papers, so their reply addressed the merits of the opposition. In addition to their arguments in the moving papers, the dental defendants argued that Barton's fraud and negligent misrepresentation causes of action were indistinguishable from her professional negligence cause of action, and they were therefore untimely under the same one-year statute of limitations (§ 340.5).

#### *IV. Barton's Motion for Leave to Amend the Complaint*

Before Barton attempted to file her opposition to the summary judgment motion, she moved for leave to amend her complaint and submitted a proposed FAC. Through recent discovery, she allegedly had learned that the IdentAlloy certificate attached to her chart was forged. She had already filed a Doe amendment naming the entity that made the IdentAlloy certificates, but she wanted to add new allegations about the forgery of the certificates and how inadequate controls in the process led to her getting the wrong crowns. She also sought to add Nationwide to the fraud cause of action; to add Nationwide, Argen, and the IdentAlloy defendant to the negligent misrepresentation cause of action; and to add the IdentAlloy defendant to the products liability causes of action. In addition, she wanted to add a seventh cause of action for unfair competition (Bus. & Prof. Code, § 17200) against Nationwide, Argen, and the IdentAlloy defendant. Argen and Nationwide opposed the motion for leave to amend the complaint, and the dental defendants joined in Nationwide's opposition. Nationwide argued in part that if the court granted leave to amend, the court should construe Nationwide's pending summary judgment motion as a summary adjudication motion, because Barton's



proposed FAC did not change the causes of action addressed in its summary judgment motion.

*V. Rulings on Barton's Motion for Leave to Amend the Complaint and the Dental Defendants' Summary Judgment Motion*

The court heard Barton's motion for leave to amend the complaint one day before it heard the dental defendants' summary judgment motion. The court granted her motion and gave her four days to file the FAC. It said that it would consider the defense motions for summary judgment to be motions for summary adjudication of the causes of action in the original complaint. At the hearing on the dental defendants' summary judgment motion, the court announced its tentative ruling to grant the motion "for [s]ummary [a]djudication as to all causes of action." The court stated that it had not considered Barton's opposition to the motion because the opposition was untimely. Barton argued that she had submitted a declaration showing a successful fax transmission to the court, and the opposition papers were not timely filed only because of "some snafu evidently on the court's side." The dental defendants pointed out that Barton's proposed FAC did not include new causes of action against them, so if the court were to grant their summary judgment motion, it would dispose of the entire action against them. Barton's counsel and the court then had the following exchange:

"[Counsel]: May I be heard on one element of that, your Honor? With respect to the amendment that was granted by the Court, is the Court requiring us to not take any clean-up steps with respect to the proposed amendment? And the reason I ask that—

“THE COURT: The Court is telling you you should do what you believe you need to do.

“[Counsel]: Okay.”

The court submitted the matter and issued a written order granting the dental defendants’ summary adjudication as to all six causes of action in the original complaint. The court declared that “[n]o opposition or objections were timely filed.” It held that the causes of action for professional negligence, fraud, and negligent misrepresentation were time-barred, although it did not expressly identify the applicable statute of limitations. It also reasoned that the dental defendants were providers of dental services and did not “manufacture, repair, or otherwise control the manufacture of the defective crowns,” and they were not therefore liable under the three products liability causes of action.

Barton moved the court to reconsider its ruling granting summary adjudication, arguing that the court clerk’s failure to file her faxed opposition papers constituted new facts or circumstances justifying reconsideration. The court denied the motion for reconsideration. It noted that the local rules made the parties responsible for confirming that electronically transmitted documents had been filed, and the rules expressly stated that the court was not responsible for malfunctions or errors in the electronic transmission of documents. But more to the point, the court determined that Barton had not presented any new facts or circumstances. Before ruling on the dental defendants’ motion, the court examined Barton’s declaration regarding the attempted fax filing of the opposition papers, and it heard argument from Barton’s counsel on the issue.

## VI. *The Dental Defendants' Motion to Strike the FAC*

Three days after the court granted summary adjudication to the dental defendants, Barton filed her FAC. The FAC still named the dental defendants in all six causes of action from the original complaint and added two causes of action against them—unfair competition and breach of contract. The unfair competition cause of action alleged that the dental defendants engaged in unlawful, unfair, or fraudulent business practices by providing fraudulent IdentAlloy certificates, concealing that the certificates were unreliable, and concealing that they took no steps to safeguard the certificates from tampering or to ensure that they were accurate. The breach of contract cause of action alleged that the dental defendants breached an agreement with Barton to use the highest quality materials available and to use the Alexander lab to manufacture the crowns.

The dental defendants responded to the FAC by demurring to it and moving to strike it. Their motion to strike argued that Barton did not seek leave to add them to the unfair competition and breach of contract causes of action, and the court did not therefore authorize those amendments. They asserted that Barton's actions deprived them of notice and an opportunity to be heard on those amendments. Moreover, they argued, the whole FAC as against them was a sham and an attempt to evade the court's summary adjudication order. They asked the court to strike the allegations against them from the FAC, deny leave to amend, and enter a judgment of dismissal in their favor.

In opposition, Barton contended that the court gave her leave to make the challenged amendments when her counsel asked about clean-up steps at the summary judgment hearing, and the court responded that counsel should do what he believed he

needed to do. Barton also contended that the court's summary adjudication order was binding only as to the original complaint, not the FAC.

The court granted the dental defendants' motion to strike the FAC without leave to amend. It explained that Barton moved to amend on one basis, and after an unfavorable ruling in the summary adjudication order, the FAC that she filed differed substantially from what she proposed. It found that Barton's interpretation of its order granting leave to amend was not reasonable. That is, the fact that the court authorized certain amendments did not mean that *any* amendments were authorized. The court thus struck the FAC as to the dental defendants because it did not conform to the order granting Barton leave to amend. In light of this ruling, it reasoned that the demurrer to the FAC was moot. The court entered a judgment of dismissal in favor of the dental defendants.

#### *VII. The Dental Defendants' Motion for Sanctions*

Before the court struck the FAC, the dental defendants moved for sanctions against Barton and her counsel on the basis that her FAC was factually frivolous and filed for an improper purpose. Their notice of motion and memorandum of points and authorities stated that they complied with the 21-day safe harbor provision of section 128.7; they had served Barton with the motion by overnight mail on February 6, 2017, and they did not file the motion until March 3, 2017. (§ 128.7, subd. (c)(1) [motion for sanctions shall not be filed unless, within 21 days after service of the motion, the opposing party fails to withdraw or appropriately correct the challenged papers].) As sanctions, they were seeking at least \$6,563 in attorney fees and costs.

The court granted the motion for sanctions and ruled that the sanctionable conduct consisted of filing a complaint that differed from the FAC that was approved by the court and “[f]iling a new complaint based on the same facts” to evade the summary adjudication ruling. But the court expressly declined to base the sanctions award on a finding that the FAC was factually frivolous. It ordered Barton and her counsel to pay \$2,500 in sanctions, rather than the higher amount sought.

## DISCUSSION

### I. *Summary Adjudication*

Barton contends that the court erred by refusing to consider her opposition to the dental defendants’ summary judgment motion and denying her motion for reconsideration. We agree that the court erred by refusing to consider her opposition, but the error was not prejudicial. Even considering the opposition, the undisputed facts demonstrate that the dental defendants were entitled to summary adjudication.

#### A. *The Court’s Abuse of Discretion*

An opposition to a summary judgment motion “shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.” (§ 437c, subd. (b)(2).) Under the local rules in effect at the time of Barton’s attempted filing, the court considered a faxed document filed upon acceptance by the clerk. (Super. Ct. San Bernardino County, Local Rules, former rule 1830 (Thomson Reuters 2017).) The filer was solely responsible for confirming filing. (Super. Ct. San Bernardino County, Local Rules, former rule 1850.) Under the California Rules of Court, if the faxed document was not filed because the court failed to process

the document after receipt, the filing party could move for an order filing the document nunc pro tunc. (Cal. Rules of Court, rule 2.304(d).) Such a motion had to be accompanied by a record of transmission and a declaration in the form specified by the rules.<sup>5</sup> (*Ibid.*)

Barton attempted to confirm her opposition filing eight days after the fax, but by then the opposition was already eight days late. She did not move the court for a nunc pro tunc order backdating the filing. As a result, the opposition was filed five days before the hearing, rather than the requisite 14 days.

A trial court generally has discretion to refuse to consider late-filed papers. (Cal. Rules of Court, rule 3.1300(d).) We therefore review the court's refusal to consider the opposition for abuse of discretion. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.) "In applying the abuse of discretion standard of review, it is not the role of the appellate court to substitute its own view as to the proper decision. [Citation.] The trial court's discretion, however, 'is not unlimited and must be "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."' [Citations.]' [Citation.] Moreover, we carefully examine a trial court order finally resolving a lawsuit without permitting the case to proceed to a trial on

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<sup>5</sup> The rules set forth the following form for the declaration: "On (date) at (time), I transmitted to the (court name) the following documents (name) by fax machine, under California Rules of Court, rule 2.304. The court's fax telephone number that I used was (fax telephone number). The fax machine I used complied with rule 2.301 and no error was reported by the machine. Under rule 2.304, I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration. [¶] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.'" (Cal. Rules of Court, rule 2.304(d).)

the merits.” (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1208 (*Parkview*).)

“Terminating sanctions such as an order granting summary judgment based upon procedural error “have been held to be an abuse of discretion unless the party’s violation of the procedural rule was willful [citations] or, if not willful, at least preceded by a history of abuse of pretrial procedures, or a showing [that] less severe sanctions would not produce compliance with the procedural rule.”” (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1364, fn. 16.) In most cases, “[a]ppropriate, limited sanctions for th[e] procedural error are proper; ‘terminating sanctions’ are not.” (*Parkview, supra*, 133 Cal.App.4th at p. 1216.)

Under the circumstances of this case, the trial court abused its discretion by refusing to consider the opposition and granting summary adjudication. The court’s summary adjudication order amounted to a terminating sanction, but none of the circumstances justifying such a sanction existed. The court concluded that the dental defendants had carried their initial burden of showing no triable issue of material fact, and without considering the late-filed opposition, the court granted summary adjudication on that basis. This order sounded the death knell for Barton’s case against the dental defendants. It disposed of all causes of action in the complaint, and because the court did not authorize additional causes of action against the dental defendants in the FAC, the order was equivalent to an order granting summary judgment for them. But there was no showing that Barton willfully filed the opposition late or had previously abused pretrial procedures. (*Levingston v. Kaiser Foundation Health Plan, Inc.* (2018) 26 Cal.App.5th

309, 317, 319 [the court erred by refusing to continue the summary judgment hearing so that it could consider a late opposition, when there was no evidence that the plaintiff acted willfully and no history of abusing pretrial procedures].) Nor was there a showing that less severe sanctions were inadequate. The dental defendants had been served with the opposition papers in a timely manner and filed a reply brief, so there was no prejudice to them other than preparing for and appearing at a second hearing. The court could have continued the hearing and awarded as sanctions the dental defendants' fees and costs for appearing at a second hearing. (*Parkview, supra*, 133 Cal.App.4th at p. 1212.) The court thus abused its discretion by granting summary adjudication for the dental defendants without considering Barton's opposition. (*Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1161 ["An order based upon a curable procedural defect . . . , which effectively results in a judgment against a party, is an abuse of discretion"].)

#### B. *No Prejudice*

Nevertheless, the refusal to consider Barton's opposition was not prejudicial. We have reviewed her opposition papers, and our background section summarizes relevant evidence that she proffered. Our de novo review of the moving, opposition, and reply papers reveals that the dental defendants were entitled to summary adjudication. Accordingly, even if the court had considered her opposition papers, there is no reasonable probability that Barton would have achieved a better result. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802.)

The trial court may grant summary adjudication if there is no triable issue of material fact and the issues raised by the pleadings may be decided as a matter of law.



(§ 437c, subds. (c), (f); *Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) To prevail, moving defendants must show that one or more elements of the challenged causes of action cannot be established or that there is a complete defense to the causes of action. (§ 437c, subds. (a), (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).)

Once the moving defendants have carried their initial burden, the burden shifts to the plaintiff to show a triable issue of material fact with respect to the causes of action or defense. (§ 437, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 849, 850.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar*, at p. 850.)

#### 1. *Professional Negligence, Fraud, and Negligent Misrepresentation*

The court reasoned that the causes of action for professional negligence, fraud, and negligent misrepresentation were time-barred. The Medical Injury Compensation Reform Act of 1975 (MICRA) sets forth the statute of limitations for actions based on the professional negligence of health care providers, including dentists. (§ 340.5, subd. (1); *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1514 (*Smith*); *Hazel v. Hewlett* (1988) 201 Cal.App.3d 1458, 1461, 1463.) The relevant statute, section 340.5, incorporates two limitations periods: The plaintiff must bring the action within “three years after the date of injury *or* one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, *whichever occurs first*.” (§ 340.5, italics added.)

Section 340.5 thus erects two hurdles to the timely maintenance of a claim. (*Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 758 (*Hills*).) “[I]f the action is properly brought within one year of reasonable discovery, the action is nevertheless barred if the three-year period is not also satisfied.” (*Ibid.*) The three-year limitations period puts an outside limit on the time to bring the cause of action. (*Garabet v. Superior Court* (2007) 151 Cal.App.4th 1538, 1551; *Hills, supra*, at p. 761.) The three-year period starts running “once there is a manifestation of the [plaintiff’s] injury in some significant way.” (*Garabet, supra*, at p. 1545.) “This event may occur even without the knowledge that negligence was the cause of the injury.” (*Hills*, at p. 762.) There need only be some physical manifestation of appreciable harm. (*Garabet*, at p. 1545.) The three-year period may be tolled only by proof of fraud, intentional concealment, or the presence of a nontherapeutic and nondiagnostic foreign body in the injured person. (§ 340.5.)

Even considering the opposition papers, there is no question that Barton’s causes of action for professional negligence, fraud, and negligent misrepresentation were barred by the three-year limitations period. It is undisputed that her physical symptoms manifested themselves almost immediately after Dr. Elias placed her crowns in April 2010. At two appointments later that month, she complained of discomfort and swelling in the area of her crowns. She continued to complain of pain, swelling, discomfort, and a nodule on her tongue at appointments in May and September 2010. She even expressed concern that she was having an allergic reaction to the crowns and asked Dr. Elias to remove them in May 2010. But she did not file suit until August 2014, over four years later. Regardless of whether Barton’s action was timely under the one-year limitations

period, the three-year limitations period had long since expired. (*Hills, supra*, 152 Cal.App.3d at pp. 762-763 [affirming summary judgment for the defendant because it was “inescapable” that the plaintiff “suffered the damaging effects of the malpractice more than three years before filing suit”].)

Likewise, the fraud and negligent misrepresentation causes of action are time-barred. Our Supreme Court has “not limited application of MICRA provisions to causes of action that are based solely on a ‘negligent act or omission’ . . . .” (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 192.) “[A]dditional causes of action frequently arise out of the same facts as a medical malpractice cause of action. These may include battery, products liability, premises liability, fraud, breach of contract, and intentional or negligent infliction of emotional distress. Indeed, a plaintiff hoping to evade the restrictions of MICRA may choose to assert *only* seemingly non-MICRA causes of action.” (*Smith, supra*, 133 Cal.App.4th at p. 1514.)

Accordingly, when the plaintiff asserts something other than medical malpractice, the court must determine whether the causes of action are nevertheless based on the professional negligence of the health care provider so as to trigger the MICRA statute of limitations (§ 340.5). (*Smith, supra*, 133 Cal.App.4th at p. 1514.) Courts “must focus on the nature or gravamen of the claim, not the label or form of action the plaintiff selects.” (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 347.) Causes of action that challenge the manner in which the professional rendered health care services, and that do not allege “some collateral course of conduct pursued for [the professional’s] own gain or gratification,” are subject to section 340.5. (*Id.* at p. 352 [section 340.5

applied to causes of action for battery and intentional infliction of emotional distress]; see also *Tell v. Taylor* (1961) 191 Cal.App.2d 266, 271 [holding, in a pre-MICRA case, that “even though the plaintiff alleges false representations on the part of the physician or fraudulent concealment, our courts have always treated the action as one for malpractice”].)

In this case, the fraud, negligent misrepresentation, and professional negligence causes of action arise from the same factual nucleus. The complaint alleged fraud, and then the other two causes of action incorporated the fraud allegations by reference. The gravamen of the misrepresentation causes of action was that the dental defendants said that they would use certain crowns but did not, and they did not fully inform Barton of the risks associated with the crowns that they did use. These causes of action merely recast the allegations of professional negligence and challenged the purportedly inadequate manner in which Dr. Elias rendered health care services. They are thus subject to the MICRA statute of limitations and are also time-barred by section 340.5.<sup>6</sup>

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<sup>6</sup> In the trial court, the dental defendants argued that the professional negligence, fraud, and negligent misrepresentation causes of action were untimely under the one-year limitations period, but they did not make the same argument with respect to the three-year period. The trial court concluded that the causes of action were untimely without identifying the specific limitations period. Before we may affirm the summary adjudication order on a ground not relied on by the court, we must “afford the parties an opportunity to present their views on the issue by submitting supplemental briefs.” (§ 437c, subd. (m)(2).) A supplemental brief “may include an argument that additional evidence relating to that ground exists, but the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue.” (§ 437c, subd. (m)(2).) Supplemental briefing generally is not required “when the issue is ‘purely a legal one’ and both parties have already briefed the issue” on appeal. (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 336, fn. 12; accord *Bains v. Moores* (2009) 172 Cal.App.4th 445,

Barton contends that there is a triable issue of material fact “as to whether [she] diligently investigated the cause of her symptoms and filed within the applicable limitations period,” and she argues that the three-year limitations period began to run at the earliest in February 2012, when she tested positive for a nickel allergy. But she does not dispute that she started suffering symptoms in April 2010. Whether and when she diligently investigated the *cause* of her symptoms is irrelevant for our purposes. Barton’s action had to be timely under both the three-year and the one-year periods of section 340.5. (*Hills, supra*, 152 Cal.App.3d at p. 758.) The belated discovery of the alleged cause of her injury might delay commencement of the one-year period, but it does not affect commencement of the three-year period, which occurred as soon as the damaging effects of the alleged malpractice manifested themselves. (*Id.* at pp. 759, 762.)

Barton also contends that the dental defendants are estopped from asserting the statute of limitations defense because Dr. Elias “dismissed any suggestion that the crowns could be the source of [her] problems.” She cites *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, a legal malpractice case. In that case, the defendant attorney was estopped from relying on the statute of limitations at the demurrer stage. (*Id.* at pp. 403-405.) He had allegedly advised his corporate client that it need not comply with corporate formalities and that its suspension for this lack of compliance would not affect

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471, fn. 39.) Barton and the dental defendants addressed the three-year limitations period in the opening, respondents’, and reply briefs on appeal. Although a supplemental briefing notice arguably is not required, we nevertheless notified the parties that they could submit supplemental briefing on this issue. (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1096, fn. 24.)

its legal or business claims. (*Id.* at pp. 398, 404.) The corporation’s legal malpractice action was untimely only because it was suspended and its powers were not revived until after the statute of limitations expired. (*Id.* at p. 404.) Equitable estoppel required four elements: ““(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury.”” (*Id.* at pp. 403-404.) Thus, equitable estoppel addressed the circumstances in which a party was foreclosed from arguing the statute of limitations as a defense to an untimely action “because his conduct ha[d] induced another into forbearing suit within the applicable limitations period.” (*Id.* at p. 407) The court held that the attorney’s alleged advice established a classic case of equitable estoppel. (*Id.* at p. 404.)

Equitable estoppel does not apply here. The undisputed evidence shows that Barton was not ignorant of the true state of facts and did not actually rely on Dr. Elias’s statement. She suspected that she might be allergic to her crowns and asked Dr. Elias to remove them in May 2010. Even though Dr. Elias said she was not having an allergic reaction, she continued to see other doctors about her symptoms, including an oral surgeon and an allergist. She and the allergist discussed whether she might be allergic to a component of her crowns, and she asked Argen whether her crowns could be tested without removal. She then had another dentist remove them. These were not the actions of someone who was ignorant of the possibility that the crowns were causing an allergic reaction. And she did not rely on Dr. Elias’s statement, but continued to pursue the

allergy issue. Dr. Elias's statement did not induce her to forbear suit within the limitations period. She did that on her own.

At bottom, even considering Barton's opposition papers, there is no triable issue of material fact as to the untimeliness of the professional negligence, fraud, and negligent misrepresentation causes of action.

## 2. *Products Liability Causes of Action*

"A manufacturer or retailer may be held strictly liable for placing a defective product on the market if the plaintiff's injury results from a reasonably foreseeable use of the product. [Citations.] Strict product liability may be premised upon a theory of design defect, manufacturing defect or failure to warn." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1302.)

"An important exception to the general rule of strict liability applies to medical providers that use or dispense products as part of their treatment of patients." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 316.) "California courts have repeatedly held that strict liability may not be imposed against health care providers for injuries suffered by their patients." (*San Diego Hospital Assn. v. Superior Court* (1994) 30 Cal.App.4th 8, 13.) "The strictly liable defendant must be in 'the business of' supplying the defective product to the user." (*Id.* at p. 16.) Doctors, dentists, and hospitals are not in the business of selling drugs or medical devices. (*Murphy v. E.R. Squibb & Sons, Inc.* (1985) 40 Cal.3d 672, 679.) They provide those products to patients as one element in their course of treatment and furnishing their health care services does not depend on the sale of products. (*Ibid.*)

As medical providers, the dental defendants were not strictly liable for alleged defects in Barton's crowns as a matter of law. It is undisputed that Dr. Elias ordered and distributed the crowns as part of treating Barton. There was no evidence that he manufactured the crowns, and Barton did not proffer any evidence or argument to dispute the dental defendants' status as medical providers. They were entitled to summary adjudication on the strict liability cause of action.

However, the same reasoning does not apply to Barton's other products liability causes of action, negligence and breach of warranty. (*Bigler-Engler v. Breg, Inc.*, *supra*, 7 Cal.App.5th at p. 316.) Medical providers remain liable (just not strictly liable) for the consequences of their negligent or intentional acts. (*Id.* at pp. 316-317.)

But the negligence and breach of warranty causes of action suffer the same fate as the nonproducts liability causes of action—they are also time-barred. These causes of action alleged that the dental defendants negligently sold Barton defective crowns and failed to provide adequate warnings about their possible side effects, or breached warranties that the crowns were free from defects, safe, and merchantable. The crowns were allegedly defective because they were not the high noble crowns that Barton thought she was getting. The gravamen of these causes of action is indistinguishable from the alleged professional negligence. Under all of Barton's theories, the dental defendants gave Barton crowns that did not meet her expectations and failed to provide her with relevant information about the crowns. The causes of action all challenge the manner in which the dental defendants provided their professional health care services. Consequently, the various theories merge into professional negligence for purposes of



determining the statute of limitations. (*Larson v. UHS of Rancho Springs, Inc.*, *supra*, 230 Cal.App.4th at pp. 351-352.) They are subject to the three-year limitations period of section 340.5 and are untimely for the reasons already discussed: Barton manifested the damaging effects of the alleged wrongful acts more than three years before filing suit.<sup>7</sup>

For all of these reasons, consideration of Barton's opposition papers would not have resulted in a more favorable outcome on the products liability causes of action. She was not prejudiced by the court's failure to consider her opposition. This is also true with respect to the nonproducts liability causes of action, which were untimely even considering the opposition.

## II. *Motion to Strike*

Barton contends that the court erred by striking the new causes of action against the dental defendants in the FAC. This contention lacks merit.

Section 436 gives the court discretion to strike "all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (§ 436, subd. (b).) We review an order striking a pleading for abuse of discretion. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

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<sup>7</sup> While the dental defendants argue that the products liability causes of action are time-barred on appeal, they did not argue that below, and the trial court did not grant summary adjudication on that basis. We therefore gave the parties an opportunity to submit supplemental briefing on this issue also. (§ 437c, subd. (m)(2); *City of Monterey v. Carrnshimba*, *supra*, 215 Cal.App.4th at p. 1096, fn. 24; see *ante*, fn. 6.)

There was no abuse of discretion here. Barton’s motion for leave to amend the complaint had to include a copy of the proposed FAC, state what allegations she wanted to add, and identify where the new allegations would appear by reference to the page, paragraph, and line number of the proposed FAC. (Cal. Rules of Court, rule 3.1324(a)(1) & (3).) Her motion for leave to amend the complaint did not seek to add the unfair competition and breach of contract causes of action against the dental defendants, and the order granting her motion did not authorize those new causes of action. Consequently, those particular amendments did not conform to the court’s order. (§ 436, subd. (b).) Nor did they conform to “the laws of this state” (*ibid.*), in that substantive amendments to a pleading at this stage require “notice to the adverse party” before the court may permit them. (§ 473, subd. (a)(1).) The dental defendants had no notice that Barton wanted to add new theories of liability against them. The court had discretion to strike the causes of action for these failures to conform to the court’s order and California law. (*Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1329 [court properly struck a new cause of action because it went beyond the scope of the court’s order allowing the plaintiff to amend the complaint].)

Barton argues that, at the summary judgment hearing, her counsel’s reference to clean-up steps amounted to a request to “make corrections” to the proposed FAC. Her counsel stated: “With respect to the amendment that was granted by the Court, is the Court requiring us to not take any clean-up steps with respect to the proposed amendment? And the reason I ask that—.” The court interjected: “The Court is telling you you should do what you believe you need to do.” Barton maintains that she

reasonably interpreted the court's response as tacitly permitting her to add the new causes of action. But the court did not agree that this was a reasonable interpretation of its response when it struck the challenged causes of action. And we cannot say that the court's understanding of its own comment was an abuse of discretion. It was not reasonable to think that the court would authorize, sight unseen, any amendments Barton believed were necessary, especially without notice to the affected defendants and an opportunity to respond. As the court noted in its order striking the FAC: "If Plaintiff Barton had actually sought an order to allege those additional causes of action against the Dental Defendants, the Dental Defendants would likely have opposed the motion [instead of joining Nationwide's opposition,] and their summary judgment motion would not have gone forward." The court acted well within its discretion by striking the new causes of action.

### III. *Motion for Sanctions*

Barton contends that the court erroneously imposed sanctions against her and her counsel for filing the FAC. She asserts that (1) the dental defendants did not demonstrate compliance with the safe harbor requirement for sanctions motions, and (2) she and her counsel filed the FAC in objective good faith. We also reject these arguments.

A party seeking sanctions must serve the opposing party with the sanctions motion before filing it. (§ 128.7, subd. (c)(1); *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 698 (*Martorana*)). Service of the motion starts the 21-day safe harbor period during which the opposing party may withdraw or correct the challenged pleading and thus avoid sanctions. (§ 128.7, subd. (c)(1); *Martorana, supra*, at p. 698.) If the

opposing party does not withdraw or correct the challenged pleading within the safe harbor period, the movant may then file the motion for sanctions. (§ 128.7, subd. (c)(1); *Martorana*, at p. 698.)

The court may impose sanctions for filing a pleading “primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” (§ 128.7, subds. (b)(1), (c).) It may also impose them if the pleading is legally or factually frivolous. (§ 128.7, subds. (b)(2)-(3), (c); *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440.) To obtain sanctions, the movant must show that the opposing party’s conduct was objectively unreasonable. (*Peake v. Underwood*, *supra*, at p. 440.) “A claim is objectively unreasonable if ‘any reasonable attorney would agree that [it] is totally and completely without merit.’” (*Ibid.*) We review a sanctions award for abuse of discretion. (*Id.* at p. 441.)

We agree with the dental defendants that Barton has forfeited the argument about proof of compliance with the safe harbor requirement.<sup>8</sup> “It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal.” (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.) This forfeiture rule advances efficiency and deters gamesmanship. (*Keener v. Jeld-Wen, Inc.*, *supra*, 46 Cal.4th at p. 264.) It prevents a party from choosing not to raise the issue, awaiting the outcome, and then

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<sup>8</sup> Although the dental defendants argue that Barton and her counsel have “waived” this challenge, “forfeited” is the correct term. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 262, fn. 19.)

claiming error on appeal. (*People v. Kennedy* (2005) 36 Cal.4th 595, 612, disapproved on another ground by *People v. Williams* (2010) 49 Cal.4th 405, 459.) “The policy behind the rule is fairness.” (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 826.) “It is unfair to the trial judge and to the adverse party to take advantage of an alleged error on appeal where it could easily have been corrected at trial.” (*Children’s Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 776.) An exception to the forfeiture rule exists “when the theory presented for the first time on appeal involves only a legal question determinable from facts that are (1) uncontroverted in the record and (2) could not have been altered by the presentation of additional evidence.” (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1237-1238.)

Here, the dental defendants’ motion for sanctions stated that they served Barton on February 6, 2017, and filed the motion on March 3. But as Barton now points out, the dental defendants did not submit *proof* of compliance with the safe harbor requirement, such as a declaration or a proof of service. Still, Barton did not raise this issue in either her opposition or at the hearing on the sanctions motion, so she has forfeited the issue. Her failure to challenge proof of compliance deprived the dental defendants of the opportunity to cure the claimed error. Moreover, this is not, as Barton suggests, an appropriate case for applying the exception to the forfeiture rule. Her argument does not present a pure question of law “determinable from facts that . . . could not have been altered by the presentation of additional evidence.” (*Esparza v. KS Industries, L.P.*, *supra*, 13 Cal.App.5th at pp. 1237-1238.) Indeed, the dental defendants could have easily answered any objection by filing a declaration or proof of service. Accordingly, we

decline to consider this issue on the merits or reverse the sanctions order on this ground. (*In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 826 [applying the forfeiture rule to a party’s argument that the opposing party failed to comply with the safe harbor requirement].)

Barton’s second argument fares no better. She contends that the FAC was not factually frivolous and that she therefore filed the FAC in objective good faith. This is irrelevant for our purposes. The court did not base its sanctions award on a finding that the FAC was factually frivolous. Rather, it implicitly concluded that she filed the FAC for an improper purpose—to evade the court’s summary adjudication ruling.

This determination was not an abuse of discretion. As we have explained, the summary adjudication order effectively disposed of the case against the dental defendants, given that the court did not authorize additional causes of action against them. Yet three days after the summary adjudication order, Barton filed the FAC that included new causes of action against them and departed materially from her proposed FAC. And as we have also discussed, her claimed interpretation of the court’s off-the-cuff comment as permitting any amendments she desired without notice to the court or to the affected defendants was objectively unreasonable. Barton contends that there was no evidence that she or her counsel harbored an intent to “‘impede, delay or otherwise obstruct the proper dismissal of the [d]ental [d]efendants from this case.’” But the objectively unreasonable reading of the court’s comment, and the material revisions to her proposed FAC after she realized that the court had disposed of the case against the dental defendants, constituted circumstantial evidence of just such an intent. Barton has

not shown that the court abused its discretion by imposing sanctions against her and her counsel. (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1422 [affirming a sanctions order because the court properly found that the defendant moved for relief from judgment “not to assert any arguably legitimate legal right but to frustrate and impede what [he] and his attorneys knew was an inevitable defeat”]; *Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967, 976-977 [affirming a sanctions order that was based in part on repeated attempts to circumvent the court’s prior orders striking allegations against a defendant].)

#### DISPOSITION

The judgment for the dental defendants and the order imposing sanctions against Barton and her counsel are affirmed. The dental defendants shall recover their costs of appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MENETREZ  
J.

We concur:

McKINSTER  
Acting P. J.

MILLER  
J.